

In The
Supreme Court of the United States

—◆—
ELEANOR McCULLEN, *et al.*,

Petitioners,

v.

MARTHA COAKLEY, Attorney General for
the Commonwealth of Massachusetts, *et al.*,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

—◆—
**BRIEF AMICUS CURIAE OF THE NATIONAL
HISPANIC CHRISTIAN LEADERSHIP
CONFERENCE, INTERNATIONAL SOCIETY
FOR KRISHNA CONSCIOUSNESS, UNITED STATES
CONFERENCE OF CATHOLIC BISHOPS,
AMERICAN BIBLE SOCIETY, CHRISTIAN
MEDICAL ASSOCIATION, ETHICS & RELIGIOUS
LIBERTY COMMISSION OF THE SOUTHERN
BAPTIST CONVENTION, INSTITUTIONAL
RELIGIOUS FREEDOM ALLIANCE, INTERVARSITY
CHRISTIAN FELLOWSHIP/USA, LUTHERAN
CHURCH - MISSOURI SYNOD, NATIONAL
ASSOCIATION OF EVANGELICALS, AND
CHRISTIAN LEGAL SOCIETY
IN SUPPORT OF PETITIONERS**

—◆—
MICHAEL W. MCCONNELL
559 Nathan Abbott Way
Stanford, CA 94305

KIMBERLEE WOOD COLBY
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Springfield, VA 22151

JOHN D. INAZU
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, MO 63130
(314) 935-6273
jinazu@wulaw.wustl.edu

Counsel for Amici Curiae

QUESTIONS PRESENTED

1. Whether the First Circuit erred in upholding Massachusetts' selective exclusion law under the First and Fourteenth Amendments, on its face and as applied to petitioners.

2. If *Hill v. Colorado*, 530 U.S. 703 (2000), permits enforcement of this law, whether *Hill* should be limited or overruled.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	6
ARGUMENT.....	7
I. The Massachusetts Statute and <i>Hill v. Colorado</i> Violate the Core of the Public Forum Doctrine That Is Rooted in the Right of Assembly	7
II. The Massachusetts Statute and <i>Hill</i> Wrongly Suggest That There Is A Right to Avoid Unpopular Expression in Public Places.....	19
CONCLUSION	21

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969).....	18
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942).....	21
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991)	10
<i>City Council v. Taxpayers for Vincent</i> , 466 U.S. 789 (1984).....	14
<i>Cox v. State of Louisiana</i> , 379 U.S. 536 (1965).....	19
<i>De Jonge v. Oregon</i> , 299 U.S. 353 (1937).....	13, 18
<i>Edwards v. South Carolina</i> , 372 U.S. 229 (1963).....	20
<i>Greer v. Spock</i> , 424 U.S. 828 (1976).....	12
<i>Hague v. Committee for Industrial Organiza-</i> <i>tion</i> , 307 U.S. 496 (1939)	11
<i>Hill v. Colorado</i> , 530 U.S. 703 (2000)	<i>passim</i>
<i>Hustler Magazine v. Falwell</i> , 485 U.S. 46 (1988).....	21
<i>International Soc. for Krishna Consciousness,</i> <i>Inc. v. Lee</i> , 505 U.S. 672 (1992)	15
<i>Kovacs v. Cooper</i> , 336 U.S. 77 (1949)	15
<i>McDonald v. Chicago</i> , 130 S. Ct. 3020 (2010)	10
<i>Martin v. Struthers</i> , 319 U.S. 141 (1943).....	15
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	7
<i>Presser v. Illinois</i> , 116 U.S. 252 (1886)	9

TABLE OF AUTHORITIES – Continued

	Page
<i>Perry Education Association v. Perry Local Educators' Association</i> , 460 U.S. 37 (1983).....	12, 13
<i>Rosenberger v. Rector and Visitors of University of Virginia</i> , 515 U.S. 819 (1995)	16
<i>Snyder v. Phelps</i> , 131 S. Ct. 1207 (2011)	20, 21
<i>Schneider v. State</i> , 308 U.S. 147 (1939).....	12
<i>Terminiello v. Chicago</i> , 337 U.S. 1 (1949).....	21
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945).....	10
<i>United States v. Cruikshank</i> , 92 U.S. 542 (1875).....	10, 13
<i>United States v. Grace</i> , 461 U.S. 171 (1983).....	12
<i>West Virginia Board of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	10, 21

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Const. amend. I	<i>passim</i>
Mass. Gen. Laws	
ch. 266, § 120E ^{1/2} (b).....	16, 17
ch. 266, § 120E ^{1/2} (d).....	17
ch. 266, § 120E ^{1/2} (e).....	17

OTHER AUTHORITIES:

1 Annals of Cong. (1790) (J. Gales ed., 1834)	9
Irving Brant, <i>The Bill of Rights: Its Origin and Meaning</i> (1965)	8

TABLE OF AUTHORITIES – Continued

	Page
John D. Inazu, <i>Liberty’s Refuge: The Forgotten Freedom of Assembly</i> (2012)	9, 10
Harry Kalven, Jr., <i>The Concept of the Public Forum</i> , <i>Cox v. Louisiana</i> , 1965 Sup. Ct. Rev. 1 (1965).....	12
Martin Luther King, Jr., <i>I Have a Dream: Writings & Speeches That Changed the World</i> (James M. Washington ed., 1992).....	10, 11
Clark LeBlanc & Jamin B. Raskin, <i>Disfavored Speech About Favored Rights: Hill v. Colorado, The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test</i> , 51 Am. U. L. Rev. 179 (2001)	15
Charles Marsh, <i>The Beloved Community: How Faith Shapes Social Justice, from the Civil Rights Movement to Today</i> (2005)	10
Kathleen M. Sullivan, <i>Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term</i> , 28 Pepp. L. Rev. 723 (2001).....	8
Laurence Tribe, <i>quoted in Colloquium, Professor Michael W. McConnell’s Response</i> , 28 Pepp. L. Rev. 747 (2001)	8
Timothy Zick, <i>Speech Out of Doors: Preserving First Amendment Liberties in Public Places</i> (2009).....	14, 20

INTEREST OF *AMICI CURIAE*¹

The **Christian Legal Society** (“CLS”) believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs, expression, and assembly. CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of traditional Christian beliefs.

The **National Hispanic Christian Leadership Conference**, The Hispanic National Association of Evangelicals, is America’s largest Hispanic Christian organization serving millions of constituents via our 40,118 member churches and member organizations. The NHCLC exists to unify, serve and represent the Hispanic Born Again Faith community by reconciling the vertical and horizontal elements of the Christian message via the 7 directives of Life, Family, Great Commission, Stewardship, Education, Justice and Youth.

¹ In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any party, party’s counsel, person or entity, other than *amici curiae*, their members, and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk.

The **International Society for Krishna Consciousness** (“ISKCON”) is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. The members of ISKCON adhere to the principles of Gaudiya Vaishnavism, or Krishna Consciousness, which requires followers to regularly venture into public places to distribute religious literature, solicit funds to support the religion, and encourage members of the public to participate in Krishna Consciousness. Bound by this religious duty, known in the Sanskrit language as *sankirtan*, Krishna followers regularly seek access to public places where the largest numbers of people can be found, where government regulations often complicate their ability to engage in *sankirtan*.

The **United States Conference of Catholic Bishops** (“USCCB”) is a nonprofit corporation, the members of which are the Catholic Bishops in the United States. The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation’s life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, and the sanctity of human life. Pro-life demonstrators and sidewalk counselors who speak to women considering an abortion seek to encourage a different choice because they believe doing so protects the life of the unborn and prevents adverse consequences to the woman

herself. Such speech is not harmful and, indeed, advances an important government interest in ensuring that a woman's decision will be informed.

Headquartered in Manhattan, the 196-year-old **American Bible Society** exists to make the Bible available to every person in a language and format each can understand and afford, so all people may experience its life-changing message. One of the nation's oldest nonprofit organizations and partnering with hundreds of churches and ministries, today's American Bible Society provides interactive, high- and low-tech resources enabling first-time readers and seasoned theologians alike to engage with the best-selling book of all time. Many of its partners may choose to communicate their messages in traditional public forums and, therefore, the Society has a strong interest in preserving First Amendment rights to speech in such forums.

Christian Medical Association ("CMA"), founded in 1931, provides a ministry and public voice for Christian healthcare professionals and students. With a current membership of approximately 16,000, CMA addresses policies on healthcare issues, conducts overseas medical evangelism projects, provides Third World missionary doctors with continuing education resources, and sponsors student ministries in medical and dental schools. CMA members provide charitable care for needy patients domestically and overseas, regardless of the patients' beliefs. Members fully integrate their personal faith and professional practice, not separating their motivation to care for

the poor and needy from their commitment to practicing according to faith-based moral standards.

The **Ethics & Religious Liberty Commission** (“ERLC”) is the moral concerns and public policy entity of the Southern Baptist Convention (“SBC”), the nation’s largest Protestant denomination, with over 46,000 autonomous churches and nearly 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious freedom, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution’s guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith. The constitutionally-protected right of speech, especially speech that is not popular, is of paramount concern for those who hold religious convictions about the sanctity of all human life, born and unborn.

The **Institutional Religious Freedom Alliance** (“IRFA”), founded in 2008, works to protect the religious freedom of faith-based service organizations through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious freedom, and advocate to the federal administration and Congress on behalf of the rights of faith-based services.

InterVarsity Christian Fellowship/USA (“InterVarsity”) is a Christian campus ministry that establishes and advances witnessing communities of students and faculty. InterVarsity ministers to students and faculty through small group Bible studies, large gatherings on campus, leadership training, thoughtful discipleship, and conferences and events. InterVarsity ministers to 36,675 students annually on hundreds of campuses nationwide. InterVarsity is committed to public evangelism and opposes any attempt to erode or limit peaceable assembly or impose limitations on public speech that is not viewpoint neutral.

The **Lutheran Church – Missouri Synod** (“LCMS”), is a mission-oriented, Bible-based, confessional Christian denomination headquartered in St. Louis, Missouri. Founded in 1847, the LCMS has more than 2.3 million baptized members in some 6,200 congregations and more than 9,000 pastors. Two seminaries and nine colleges and universities operate under the auspices of the LCMS, and its member congregations operate the largest Protestant parochial school system in America. The LCMS cherishes all religious liberties, including the rights of free speech and assembly guaranteed under the First Amendment to the United States Constitution, and it is committed to supporting the protection of those rights.

The **National Association of Evangelicals** (“NAE”) is the largest network of evangelical churches, denominations, colleges, and independent ministries

in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred, that civil government has no higher duty than to protect human life, and the duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.



SUMMARY OF ARGUMENT

The Massachusetts statute in this case impermissibly abridges constitutionally protected speech and expression, and this Court should reverse the lower court's decision concluding otherwise. This case also presents an opportunity for the Court to reconsider its decision in *Hill v. Colorado*, 530 U.S. 703 (2000). Because *Hill* stands in deep tension with longstanding First Amendment values and is an outlier in this Court's jurisprudence, the case should be overruled. Indeed, *Hill's* guidance is so confusing that the Court should use this opportunity to overrule *Hill* even if doing so is not strictly necessary to invalidate the Massachusetts statute.

This brief makes two arguments as to why both the Massachusetts statute and *Hill* offend the First Amendment. First, both violate the core of the public forum doctrine that is rooted in the right of assembly.

Second, both conflict with the balance of this Court’s free speech jurisprudence, which recognizes the protections of the First Amendment for even emotionally charged expression directed toward unwilling listeners – protections that unquestionably extend to the peaceful expressive activity in *Hill* and by the petitioners in this case.



ARGUMENT

I. The Massachusetts Statute and *Hill v. Colorado* Violate the Core of the Public Forum Doctrine That Is Rooted in the Right of Assembly.

The iconic image of a sidewalk protest epitomizes our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . .” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). That commitment is undermined by the Massachusetts statute, which indefinitely closes a public sidewalk to peaceful expressive activity in the absence of any exigent circumstances. A similar problem plagues this Court’s precedent in *Hill*. As Justice Kennedy explained in his dissent, *Hill* leaves unprotected core political expression conducted “in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk.” *Hill*, 530 U.S. at 765 (Kennedy, J., dissenting).

Hill’s analysis charts a course for government manipulation of the public forum to suppress

unwanted expression. It exalts form over substance. As Laurence Tribe has observed, *Hill* is “slam-dunk simple and slam-dunk wrong.” Laurence Tribe, *quoted in Colloquium, Professor Michael W. McConnell’s Response*, 28 Pepp. L. Rev. 747, 750 (2001). *See also* Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 737 (2001) (“*Hill* showed a striking readiness to accept the Colorado legislature’s effort to draw a facially neutral statute to achieve goals clearly targeting particular content.”). Justice Kennedy noted that *Hill* “contradicts more than a half century of well-established First Amendment principles.” *Id.* In fact, the principles that *Hill* contradicts extend much earlier, to the genesis of the First Amendment.

One of the most famous precursors to the sidewalk protest involved the arrest and trial of William Penn. On August 14, 1670, Penn was arrested after delivering a sermon to Quakers gathered on Gracechurch Street in London. Irving Brant, *The Bill of Rights: Its Origin and Meaning* 55 (1965). After one of the most celebrated trials in history, a jury acquitted Penn and another Quaker of the charge that their public worship constituted an unlawful assembly. *Id.* at 59.

News of Penn’s story was not contained to London – it played a pivotal role during the framing of the First Amendment. During the House debates over the language of the Bill of Rights, Theodore Sedgwick of Massachusetts criticized the proposed right of

assembly as redundant in light of the freedom of speech: “If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae.” *Annals of Congress*, vol. 1 (1790), 759 (Statement of Representative Sedgwick). John Page of Virginia responded with an oblique reference to Penn’s trial that reminded his colleagues of the real threat to liberty which the right of assembly holds at bay. *Id.* (Statement of Representative Page). Historian Irving Brant notes that “the mere reference to it was equivalent to half an hour of oratory.” Brant, *supra*, at 55. After Page spoke, the House defeated Sedgwick’s motion to strike assembly from the draft amendment by a “considerable majority.” *Annals of Congress*, vol. 1 (1790), 761. On September 24, 1789, the Senate approved the amendment in its final form, and the subsequent ratification of the Bill of Rights in 1791 enacted “the right of the people peaceably to assemble.” U.S. Const. amend. I.²

² The right of assembly is a stand-alone right not wedded to the separate petition right. See generally John D. Inazu, *Liberty’s Refuge: The Forgotten Freedom of Assembly* 21-25 (2012) (tracing textual history). We know this in part from Congressman Page’s reference during the House debates: “Penn’s gathering had nothing to do with petition; it was an act of religious worship.” *Id.* at 25. This Court has on one occasion suggested otherwise. See *Presser v. Illinois*, 116 U.S. 252, 267 (1886) (indicating that the First Amendment protects the right of assembly only if “the purpose of the assembly was to petition the

(Continued on following page)

William Penn’s legacy attests to longstanding connections between religion and assembly in public places – connections that extend to the religious petitioners in *Hill* and in the present case. The persistent witness of religious groups in public places has contributed significantly to our nation’s civic vitality. Some of that witness is reflected in the pages of this Court’s opinions. *See, e.g., West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). Far more is captured in the pages of history. *See, e.g., Charles Marsh, The Beloved Community: How Faith Shapes Social Justice, from the Civil Rights Movement to Today* (2005).

Fifty years ago, Reverend Martin Luther King, Jr., led “the greatest demonstration for freedom in the history of our nation” and delivered his historic words that grounded the Civil Rights Movement in unmistakably religious terms. Martin Luther King, Jr.,

government for a redress of grievances”); *see also* Inazu, *supra*, at 39-40 (critiquing *Presser’s* interpretation). Scholars have repeated *Presser’s* erroneous interpretation for decades, but this Court has never reinforced it. *See Thomas v. Collins*, 323 U.S. 516, 530 (1945) (referring to “the *rights* of the people peaceably to assemble and to petition for redress of grievances”) (emphasis added); *McDonald v. Chicago*, 130 S. Ct. 3020, 3031 (2010) (referring to “the general ‘right of the people peaceably to assemble for lawful purposes’” (quoting *United States v. Cruikshank*, 92 U.S. 542, 551 (1875))); *cf. Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (the First Amendment “has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances”).

I Have a Dream (August 28, 1963), reproduced in Martin Luther King, Jr., *I Have a Dream: Writings & Speeches That Changed the World* 102 (James M. Washington ed., 1992). The liberty for religious assembly in public places was indispensable to the success of the Civil Rights Movement. As King himself pronounced five years later, in remarks delivered on the eve of his assassination: “If I lived in China or even Russia, or any totalitarian country, maybe I could understand the denial of certain basic First Amendment privileges, because they hadn’t committed themselves to that over there. But somewhere I read of the freedom of assembly.” Martin Luther King, Jr., *I See the Promised Land* (April 3, 1968), reproduced in King, *supra*, at 197.

While this Court has not delineated the outer limits of the right to peaceable assembly, it has recognized that the core of the right protects peaceful expression on matters of public concern within traditional public forums. In *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), Justice Roberts explained that “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Id.* at 515 (opinion of Roberts, J.). And as this Court observed a few months after *Hague*, “the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it

may be exercised in some other place.” *Schneider v. State*, 308 U.S. 147, 163 (1939). Harry Kalven underscored this theme a generation later: “[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.” Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 11-12 (1965).

A line of cases culminating in this Court’s decision in *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1983), has shifted the moorings of the public forum doctrine from the Assembly Clause to the Speech Clause. The speech-focused doctrines play a critical role in conserving public forums as spaces for public discussion, debate, and dissent. One of the most important principles arising out of these cases is that “the government may not prohibit all communicative activity” in traditional public forums like streets and sidewalks. *Id.* at 45; see also *United States v. Grace*, 461 U.S. 171, 180 (1983) (invalidating restrictions of expression on public sidewalk near Supreme Court building and holding that government cannot alter traditional public forum status of a sidewalk); *Greer v. Spock*, 424 U.S. 828, 835 (1976) (noting “the long-established constitutional rule that there cannot be a blanket exclusion of First Amendment activity from a municipality’s open streets, sidewalks, and parks”). At the same time, more flexible standards for content-neutral

time, place, and manner restrictions acknowledge and accommodate important governmental interests in maintaining order and safety within the public forum. But the speech-oriented aspects of *Perry* and other cases *complement* the original contours of the public forum doctrine; they do *not* replace or obviate them. *Cf. De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (“The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”).³

One problem with shifting the public forum doctrine wholly into a free speech framework is that relying exclusively on the content neutrality inquiry misses the expressive connection between speech and the time, place, and manner in which it occurs. Content-neutral *time* restrictions can sever the link between message and moment. Consider, for example, the consequences for political dissent of a content-neutral time restriction that closed a public forum on symbolic days of the year like September 11th, August 6th (the day the United States detonated an atomic bomb on the city of Hiroshima), or June 28th (the anniversary of the Stonewall Riots). Content-neutral time restrictions that closed the public

³ This Court has recognized the right of assembly as “fundamental” and insisted that it “cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.” *De Jonge*, 299 U.S. at 364. “[I]t is, and always has been, one of the attributes of citizenship under a free government.” *Cruikshank*, 92 U.S. at 551.

sidewalks outside of prisons on days of executions, outside of legislative buildings on days of votes, or outside of courthouses on days that decisions are announced, would raise similar concerns. And yet all of these formally satisfy the content neutrality inquiry.

Content-neutral *place* restrictions can be similarly distorting. As Timothy Zick observes, “[s]peakers like abortion clinic sidewalk counselors, petition gatherers, solicitors, and beggars seek the critical expressive benefits of proximity and immediacy that inhere in such places.” Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* 21 (2009). Content-neutral restrictions that deny access to places of symbolic significance undermine the expression that depends upon connection to place. *Hill*’s assertion that the Colorado statute was not a regulation of speech but simply “a regulation of the places where some speech may occur,” 530 U.S. at 719, misses this fundamental connection: the location of the speech can be indispensable to its message and its efficacy.

Content-neutral *manner* restrictions can drain an expressive message of its emotive content. A ban on singing could weaken the significance of a civil rights march, a funeral procession, or a memorial celebration. Content-neutral manner restrictions can also eliminate certain classes of people from the forum altogether. Imagine, for example, a public forum that required all expression to be conveyed on notarized documents or gold-embossed stationary. *Cf. City*

Council v. Taxpayers for Vincent, 466 U.S. 789, 820 (1984) (Brennan, J., dissenting) (“The average cost of communicating by handbill is therefore likely to be far higher than the average cost of communicating by poster. For that reason, signs posted on public property are doubtless ‘essential to the poorly financed causes of little people,’ and their prohibition constitutes a total ban on an important medium of communication.” (quoting *Martin v. Struthers*, 319 U.S. 141, 146 (1943))).

None of these examples is meant to suggest that time, place, and manner restrictions are always impermissible. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (upholding ban of sound trucks on public streets “amplified to a loud and raucous volume”). But content-neutral restrictions can have debate-altering effects when they exclude or undermine certain forms of expression. As Justice Kennedy has noted, “public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat.” *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring in the judgment). This “jurisprudence of categories” is one of the fundamental problems with *Hill*, which created “a virtual template for developing passable government speech regulations targeted at the expression of unpopular views in public places.” Clark LeBlanc & Jamin B. Raskin, *Disfavored Speech About Favored*

Rights: Hill v. Colorado, The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test, 51 Am. U. L. Rev. 179, 182 (2001).

Hill's failure to guarantee meaningful access to all speakers skews the forum in favor of a particular viewpoint. *Cf. Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (recognizing that the exclusion of religious viewpoints is debate-altering). Under the guise of neutrality, ideological policing of the forum operates like a classic prior restraint – excluding certain perspectives from the forum before their ideas and values are ever able to manifest. That is one way to win a contested cultural argument. But it comes at the cost of violating our commitment to diverse viewpoints in the public forum.

Consider the implications for the present case. The Massachusetts statute provides that “[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within [specified distances around those facilities].” Mass. Gen. Laws ch. 266, § 120E^{1/2}(b). The statute exempts from this absolute prohibition only facility patients, facility employees acting within the scope of their employment, law enforcement and other certain government agents acting within the scope of their employment, and “persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility.” *Id.* It therefore criminalizes expressive activity concerning matters of

public concern on public ways and sidewalks near reproductive health facilities.

It is worth underscoring the sheer magnitude of these restrictions. Ordinary citizens are excluded from covered zones unless they are “using the public sidewalk . . . *solely* for the purpose of reaching a destination other than such facility.” Mass. Gen. Laws ch. 266, § 120E^{1/2}(b)(4) (emphasis added).⁴ The statute criminalizes any purposeful conversation and *all* public assemblies of two or more people in a covered zone. If Eleanor McCullen approaches a willing listener to discuss abortion in a covered zone, she is subject to three months’ imprisonment for a first offense, and two and a half years’ imprisonment for each subsequent violation. *Id.* at § 120E^{1/2}(d) and (e). For that matter, the statute even prevents McCullen from entering a covered zone to sing or pray quietly. These possibilities illustrate the striking dissonance between the First Amendment and the Massachusetts statute that Respondents argue is justified by *Hill*.

If Massachusetts can close off the sidewalks surrounding reproductive health facilities to peaceful expressive activity, then the government can prohibit expression in a wide range of circumstances. A state

⁴ Similarly, faculty and government employees lose their privilege to occupy covered zones if they act outside the scope of their employment. Mass. Gen. Laws ch. 266, § 120E^{1/2}(b)(2)-(3). Thus, the statute criminalizes any expressive purpose outside of the scope of their employment.

might seek to undermine union strikes by closing off public sidewalks surrounding factories to peaceful expressive activity. Or the state might seek to stifle criticism of a controversial legislative policy by excluding peaceful expressive activity from the public sidewalks near the state capitol. A state could offer high-minded justifications for these hypothetical regulations just as Massachusetts has identified justifications for its statute. In the end, however, these regulations fundamentally undermine the public forum.

This is not to say that the state is without any recourse for regulating a traditional public forum. The Assembly Clause protects only *peaceable* assembly. Longstanding First Amendment doctrine allows the state to regulate speech and assembly that cross the threshold of violence – but the state bears the burden of drawing the constitutionally appropriate line. As this Court noted in *De Jonge*:

[First Amendment] rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.

299 U.S. at 364-65. *See also* *Brandenburg v. Ohio*, 395 U.S. 444, 449 n.4 (1969) (“Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions

between mere advocacy and incitement to imminent lawless action”).⁵ There is no allegation in this case or in *Hill* of speech or assembly that was, or would be, violent or disorderly. Instead, *Hill* and the Massachusetts statute enable perpetual bans on the kind of peaceful expressive activity that lies at the core of the First Amendment.

II. The Massachusetts Statute and *Hill* Wrongly Suggest That There Is A Right to Avoid Unpopular Expression in Public Places.

Hill was premised on the novel proposition “that citizens have a right to avoid unpopular speech in a public forum.” *Hill*, 530 U.S. at 771 (Kennedy, J., dissenting). The Massachusetts statute rests on similar logic. But this reasoning is at odds with the overwhelming thrust of this Court’s free speech jurisprudence, which protects the ability of speakers to communicate to unwilling listeners (absent exceptions not relevant to *Hill* or the instant case). *Id.*

⁵ Limitations on the public forum might also be permissible when they respond to exigent circumstances or are narrowly tailored to ensure free access to public spaces. A municipality might, for example, limit protests on public streets on mornings when street cleaning occurs. Firefighters might disperse even a peaceful assembly if necessary to reach a burning building. And “[g]overnmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.” *Cox v. State of Louisiana*, 379 U.S. 536, 554-55 (1965).

(collecting cases). There is no “right to be let alone” from “public expression in traditional public forums.” *Zick, supra*, at 87. As this Court made clear in *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963), “[t]he Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.”

The peaceful and non-confrontational expression engaged in by the petitioners here falls well within this Court’s free speech jurisprudence, which permits even *hurtful* speech, expression, and protest. As the Court observed just two terms ago in *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011), “[a]s a Nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate.” *Snyder’s* words reflect long-standing First Amendment principles:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience,

annoyance, or unrest. There is no room under our Constitution for a more restrictive view.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (internal citations omitted). See also *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) (asserting that speech may not be restricted “because [it] may have an adverse emotional impact on the audience”).⁶ These commitments are not cost-free, but they are costs that we as a Nation committed to long ago.

CONCLUSION

This Court has noted that “[w]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse, or even contrary, will disintegrate the social organization.” *Barnette*, 319 U.S. at 641. Part of our assurance

⁶ Even if our capacity to endure hurtful expression reaches an outer limit, neither the petitioners here nor the petitioners in *Hill* come close to that line. Nothing in the record in either *Hill* or the instant case evidences speech or expression “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Snyder*, 131 S. Ct. at 1223 (Alito, J., dissenting) (citations and quotations omitted). Nor can it be said that the speech and expression of the abortion protestors and sidewalk counselors in these cases form “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

of this freedom rests in our shared commitment to peaceable assembly. But *Hill* and the Massachusetts statute go well beyond ensuring peaceability. *Amici* urge this Court to reverse the lower court decision, overrule *Hill*, and restore “the proud tradition of free and open discourse in a public forum.” *Hill*, 530 U.S. at 765 (Kennedy, J., dissenting).

Respectfully submitted,

JOHN D. INAZU
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, MO 63130
(314) 935-6273
jinazu@wulaw.wustl.edu

MICHAEL W. McCONNELL
559 Nathan Abbott Way
Stanford, CA 94305

KIMBERLEE WOOD COLBY
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Springfield, VA 22151

Counsel for Amici Curiae

September 16, 2013